SUPREME COURT, U. S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

NO. 71-1207

DAVID BAYLESS, ET AL.,

Petitioners

v.

FLOYD MARTINE, ET AL.,

Respondents

REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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Opinions Below

The trial court's opinions are unreported. The Court of Appeals opinions are reported at 430 F.2d 873, and 451 F.2d 561.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to Section 28 U.S.C. 1254(1).

Questions Presented

1. Whether a public university may suspend students for participating in an outdoor, silent, peace vigil for the reasons that:

(a) it was held at a time and in an area unauthorized by university regulations and expressly forbidden by school officials;

(b) university officials allegedly feared a possibly hostile reaction from onlookers; and

(c) the onlookers might make noise distracting to classes in adjacent buildings.

2. Whether a university "student expression area" regulation, pursuant to which the petitioners were purportedly suspended, is defective under substantive and procedural First Amendment standards.

Statutes and Regulations Involved

Regulations from student handbook set forth verbatim by Circuit Court at 430 F.2d 873 at 875.

Statement of the Case

Respondents agree by and large with the Statement of the Case as set forth in Appellants' Petition, but submit the summary of the case as set forth in the trial court's Memorandum Opinion and Order of January 18, 1971, presents a very accurate summary of the nature of the case, and the legal proceedings which have preceded this appeal.

Respondents are unable to summarize the facts any better than did the trial court in its last Order, and therefore quote a part of said Order:

> "Petitioners were suspended from Southwest Texas University for their participation in a campus demonstration on November 13, 1969. Following a similar Vietnam Moratorium demonstration during the previous month, the University had received complaints from students and faculty that attendant noise and confusion interfered with

teaching, and actually caused the dismissal of some classes. Because of this disruption, University officials expressed a desire in meeting with Moratorium group representatives that any future protest be conducted at a proper time and place. In accord with this concern, the students were offered alternative locations for their November protest. One of these locations was the very spot for which the students proposed their demonstration, but at a time during the noon hour when no classes were in session.

"Rejecting these reasonable offers by the University, the students persisted in their original plans to hold a demonstration at a time and place which the University had reason to believe would result in a repetition of the October class disruptions. Furthermore, the students persisted despite their own expression of concern and that of University officials that a violent confrontation might be brought on by other campus organizations opposed to the Moratorium.

"Prior to the protest, the Dean of Students, Floyd Martine, announced both orally and by letter that the demonstration as planned was unauthorized by a University regulation. As the illegal demonstration began on November 13, 1969, Dean Martine read a further statement to the group. Most of the demonstrators dispersed, but these ten plaintiffs again persisted. Only after these repeated warnings did the Dean take action to suspend the dissidents."

Respondents agree with the summary of the court proceedings as set forth by Petitioners, pages 6-7 and 8.

Argument and Authorities

Respondents submit the lower courts in this case have not ignored the announced principle in *Tinker v. Des Moines Independent School District*, 393 U.S. 503,

89 S.Ct. 733, 21 L.Ed.2d 731 (1969), but rather have applied such principles to the facts in the present case.

Respondents further submit that they have been unable to find a decision from any other circuit, which holds that a University or College may not have a reasonable regulation as to time, place and manner for student demonstrations. To do so, would be a failure to adhere to this court's prior pronouncement in *Tinker* that:

> "The Constitution says that Congress (and the states) may not abridge the right to free speech. This provision means what it says. *We properly read it to permit reasonable regulation of speech-connected activities in carefully restricted circumstances.*" (Emphasis added.) 393 U.S. 503, 513.

Petitioners contend that the activity in which they were engaging at the very instant that they were suspended was constitutionally protected and all that had occurred previously on campus, and the disruption that was occurring at the time of the second demonstration should have been ignored by the administration and the courts in this case.

In effect, Petitioners are asking this court to subscribe to the theory that the Constitution protects conduct viewed in a vacuum.

Professor Charles Alan Wright in a recent Vanderbilt Law Review article entitled, "The Constitution On The Campus," 22 Van.L.R. 1027-1088 (1969), discusses the history and present law relating to students' constitutional rights and responsibilities on and off campus. On page 1042 of his article, Professor Wright makes the following observation:

> "On the view I take of the matter, that the first amendment applies with full vigor on the campus, it is a false dichotomy to suggest, as some have,

that there are circumstances in which a university can limit or forbid 'the exercise of a right guaranteed by the Constituiton or by a law of the United States to persons generally.' I do not think such a conflict ever can arise, because I do not read the first amendment as granting rights in a vacuum, but rather as granting rights that exist at a particular time and place. 'The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time.' To revert to an example I suggested earlier, a rule barring loud discussions in the reading room of the library does not limit 'the exercise of a right guaranteed by the Constitution . . . to persons generally,' for no one has a constitutional right to speak in a place so clearly inappropriate. *The nature of the University, and the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable*, but the first amendment is no bar to reasonable regulations of that kind." (Emphasis added.)

The lower courts in this case found no abridgement of first amendment rights, but rather ample testimony indicating a deliberate attempt to protest wherever and whenever they please. The Constitution does not protect such activity. *Adderley v. Florida*, 385 U.S. 39, 87 S.Ct. 242, 17 L.Ed.2d 149 (1966).

The Petitioners made an all out attack upon the student expression area rule (quoted verbatim by Circuit Court *Bayless v. Martine*, 430 F.2d 873 at 875). But the fact of the matter is, as pointed out by the Circuit Court, the Petitioners never made any attempt to use the designated area, and thus were unable to show the trial court that such an area was and is "an area that a benevolent government has provided

as a safe haven for crackpots," as alleged by Petitioners, and as claimed by them at present time.

CONCLUSION

This Court has repeatedly held that first amendment exercise by students may be reasonably regulated by public school officials, and in this case the lower courts have adhered to such principle and found such reasonable regulation.

This Court should deny this Application for Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, Brief in Opposition, was served upon the Petitioners by placing same in the United States Certified Mail with sufficient postage attached and addressed to the attorneys of record for Petitioners, Mr. Mark Z. Levbarg, 807 Rio Grande, Austin, Texas 78701 and Mr. Melvin L. Wulf and Mr. Joel M. Gora, American Civil Liberties Union Foundation, 156 Fifth Avenue, New York, New York 10010.

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